

Amendment No. 1 to HB0500

McManus
Signature of Sponsor

AMEND Senate Bill No. 465*

House Bill No. 500

by deleting all language after the enacting clause and by substituting instead the following:

SECTION 1. Tennessee Code Annotated Section 56-9-103, is amended by adding the following new subdivisions and by redesignating the current subdivisions accordingly:

(15) "Netting agreement" means:

(A) A contract or agreement, including terms and conditions incorporated by reference in it, including a master agreement, which master agreement, together with all schedules, confirmations, definitions, and addenda to it and transactions under any of them, shall be treated as one netting agreement, that documents one or more transactions between the parties to the agreement for or involving one or more qualified financial contracts and that provides for the netting, liquidation, setoff, termination, acceleration, or close-out, under or in connection with one or more qualified financial contracts or present or future payment or delivery obligations or payment or delivery entitlements under one or more qualified financial contracts, including liquidation or close-out values relating to those obligations or entitlements, among the parties to the netting agreement;

(B) Any master agreement or bridge agreement for one or more master agreements described in subdivision (15)(A); or

(C) Any security agreement or arrangement or other credit enhancement or guarantee or reimbursement obligation related to any contract or agreement described in subdivision (15)(A) or (15)(B); provided, that any contract or agreement described in subdivision (15)(A) or (15)(B) relating to agreements or transactions that are not qualified financial contracts shall be deemed to be a netting agreement only with respect to those agreements or transactions that are qualified financial contracts;

(17)

(A) "Qualified financial contract" means any commodity contract, forward contract, repurchase agreement, securities contract, swap agreement, and any similar agreement that the commissioner determines to be a qualified financial contract for the purposes of this chapter; provided, that the insurer entered into such contract or agreement in accordance with:

(i) Section 56-3-303(a)(21); and

(ii) The insurer's derivative instruments use plan that has been approved by the commissioner pursuant to § 56-3-303(a)(21);

(B) As used in subdivision (17)(A), "commodity contract" means:

(i) A contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a board of trade or contract market under the Commodity Exchange Act, 7 U.S.C. § 1 et seq., or a board of trade outside the United States;

(ii) An agreement that is subject to regulation under Section 23 of the Commodity Exchange Act, 7 U.S.C. § 23, as amended from time to time, and that is commonly known to the commodities trade as a margin account, margin contract, leverage account, or leverage contract;

(iii) An agreement or transaction that is subject to regulation under Section 6c(b) of the Commodity Exchange Act, 7 U.S.C. § 6c(b), as amended from time to time, and that is commonly known to the commodities trade as a commodity option;

(iv) Any combination of the agreements or transactions referred to in this subdivision (17)(B); or

(v) Any option to enter into an agreement or transaction referred to in this subdivision (17)(B);

(C) As used in subdivision (17)(A), “forward contract,” “repurchase agreement,” “securities contract,” and “swap agreement” have the meanings set forth in the Federal Deposit Insurance Act, 12 U.S.C. § 1821(e)(8)(D), as amended from time to time.

SECTION 2. Tennessee Code Annotated, Title 56, Chapter 9, Part 3, is amended by adding the following language as a new, appropriately designated section:

56-9-3__.

(a)

(1) Notwithstanding any other provision of this chapter, including any other provision of this chapter permitting the modification of contracts, or any other state law to the contrary, no person shall be stayed or prohibited from exercising:

(A) A contractual right to cause the termination, liquidation, acceleration, or close-out of obligations under or in connection with any netting agreement or qualified financial contract with an insurer because of:

(i) The insolvency, financial condition, or default of the insurer at any time, provided that the right is enforceable under another provision of law other than this chapter; or

(ii) The commencement of a formal delinquency proceeding under this chapter;

(B) Any right under a pledge, security, collateral, reimbursement or guarantee agreement or arrangement or any other similar security arrangement, or arrangement or other credit enhancement relating to one or more netting agreements or qualified financial contracts; or

(C) Subject to § 56-9-319, any right to set off or net out any termination value, payment amount, or other transfer obligation arising under or in connection with one or more qualified financial contracts where the counterparty or its guarantor is organized under the laws of the

United States or a state or a foreign jurisdiction approved by the Securities Valuation Office of the National Association of Insurance Commissioners as eligible for netting.

(2) Notwithstanding any other provision of this chapter, including any other provision of this chapter permitting the modification of contracts, or any other state law to the contrary, if a counterparty to a master netting agreement or a qualified financial contract with an insurer subject to a proceeding under this chapter terminates, liquidates, closes out, or accelerates the agreement or contract, damages shall be measured as of the date or dates of termination, liquidation, close-out, or acceleration; the amount of a claim for damages shall be actual direct compensatory damages calculated in accordance with subsection (f) of this section.

(b) Upon termination of a netting agreement or qualified financial contract, the net or settlement amount, if any, owed by a nondefaulting party to an insurer against which an application or petition has been filed under this chapter shall be transferred to, or on the order of, the receiver for the insurer, even if the insurer is the defaulting party, notwithstanding any walkaway clause in the netting agreement or qualified financial contract. For purposes of this subsection, the term “walkaway clause” means a provision in a netting agreement or a qualified financial contract that, after calculation of a value of a party’s position or an amount due to or from one of the parties in accordance with its terms upon termination, liquidation, or acceleration of the netting agreement or qualified financial contract, either does not create a payment obligation of a party or extinguishes a payment obligation of a party in whole or in part solely because of the party’s status as a nondefaulting party. Any limited two-way payment or first method provision in a netting agreement or qualified financial contract with an insurer that has defaulted shall be deemed to be a full two-way payment or second method provision as against the defaulting insurer. Any such property or amount shall, except to

the extent it is subject to one or more secondary liens or encumbrances, or rights of netting or setoff, be a general asset of the insurer.

(c) In making any transfer of a netting agreement or qualified financial contract of an insurer subject to a proceeding under this chapter, the receiver shall either:

(1) Transfer to one party, other than an insurer subject to a proceeding under this chapter, all netting agreements and qualified financial contracts between a counterparty or any affiliate of the counterparty and the insurer that is the subject of the proceeding, including:

(A) All rights and obligations of each party under each netting agreement and qualified financial contract; and

(B) All property, including any guarantees or other credit enhancement, securing any claims of each party under each netting agreement and qualified financial contract; or

(2) Transfer none of the netting agreements, qualified financial contracts, rights, obligations, or property referred to in subdivision (c)(1), with respect to the counterparty and any affiliate of the counterparty.

(d) If a receiver for an insurer makes a transfer of one or more netting agreements or qualified financial contracts, then the receiver shall use its best efforts to notify any person who is party to the netting agreements or qualified financial contracts of the transfer by twelve o'clock (12:00) noon, the receiver's local time, on the business day following the transfer. For purposes of this subsection (d), "business day" means a day other than a Saturday, Sunday, or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

(e) Notwithstanding any other provision of this chapter, a receiver may not avoid a transfer of money or other property arising under or in connection with a netting agreement or qualified financial contract, or any pledge, security, collateral, or guarantee agreement or any other similar security arrangement or credit support document relating to a netting agreement or qualified financial contract, that is made before the

commencement of a formal delinquency proceeding under this chapter. However, a transfer may be avoided under § 56-9-315 if the transfer was made with actual intent to hinder, delay, or defraud the insurer, a receiver appointed for the insurer, or existing or future creditors.

(f)

(1) In exercising the receiver's rights of disaffirmance or repudiation with respect to any netting agreement or qualified financial contract to which an insurer is a party, the receiver for the insurer shall either:

(A) Disaffirm or repudiate all netting agreements and qualified financial contracts between a counterparty or any affiliate of the counterparty and the insurer that is the subject of the proceeding; or

(B) Disaffirm or repudiate none of the netting agreements and qualified financial contracts referred to in subdivision (f)(1)(A), with respect to the person or any affiliate of the person.

(2) Notwithstanding any other provision of this chapter, any claim of a counterparty against the estate arising from the receiver's disaffirmance or repudiation of a netting agreement or qualified financial contract that has not been previously affirmed in the liquidation or immediately preceding conservation or rehabilitation case shall be determined and shall be allowed or disallowed as if the claim had arisen before the date of the filing of the petition for liquidation or, if a conservation or rehabilitation proceeding is converted to a liquidation proceeding, as if the claim had arisen before the date of the filing of the petition for conservation or rehabilitation. The amount of the claim shall be the actual direct compensatory damages determined as of the date of the disaffirmance or repudiation of the netting agreement or qualified financial contract. The term "actual direct compensatory damages" does not include punitive or exemplary damages, damages for lost profit or lost opportunity, or damages for pain and suffering, but does include normal and reasonable costs of cover or other

reasonable measures of damages utilized in the derivatives, securities, or other market for the contract and agreement claims.

(g) As used in this section, “contractual right” includes any right set forth in a rule or bylaw of a derivatives clearing organization as defined in the Commodity Exchange Act, 7 U.S.C. § 1a, as amended from time to time, a multilateral clearing organization as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C. § 4421, as amended from time to time, a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, 7 U.S.C. § 7b-1, as amended from time to time, a derivatives transaction execution facility registered under the Commodity Exchange Act, 7 U.S.C. § 7a, as amended from time to time, or a board of trade as defined in the Commodity Exchange Act, 7 U.S.C. § 1a, as amended from time to time, or in a resolution of the governing board thereof and any right, whether or not evidenced in writing, arising under statutory or common law, or under law merchant, or by reason of normal business practice.

(h) This section shall not apply to persons who are affiliates of the insurer that is the subject of the proceeding.

(i) All rights of counterparties under this chapter shall apply to netting agreements and qualified financial contracts entered into on behalf of the general account or separate accounts if the assets of each separate account are available only to counterparties to netting agreements and qualified financial contracts entered into on behalf of such separate account.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring

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